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the Government. *United States* v. *Terminal Railroad Association*, 215 U. S. 595; *United States* v. *Terminal Railroad Association*, 224 U. S. 383; *Ex parte United States*, 226 U. S. 420; *United States* v. *Terminal Railroad Association*, 236 U. S. 194.

This Court has already sent down four mandates and the end is not yet. The following characterization by the learned counsel for the Terminal Railroad Association indicates their idea of the present status of the proceeding and what the Court and the parties may expect for the future, viz:

> This proceeding is the latest fruit of a litigious tree which was planted a generation ago and has since borne an abundant harvest of distraction and confusion. (Br. 1.)
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> * * * * *
>
> the Government has long ago dropped out since the public interests are not involved, and the present field of battle is now cleared for the internecine strife between the various proprietary lines which own and control these Terminal properties. (Br. 2).

The original case was commenced under the Sherman Act (Ch. 647, 26 Stat. 209) and for 20 years the several hearings have been conducted before three Circuit Judges under an expediting certificate (Ch. 544, 32 Stat. 823; Ch. 428, 36 Stat. 854).

The present proceeding was instituted by a motion in the District Court by the West Side Lines [1]

[1] For brevity and convenience the appellee carriers will be referred to as the "West Side Lines." The Terminal Railroad Association will be referred to as "Terminal." The other appellant carriers wil be referred to as the "East Side Lines."

(Tr. 124) for a rule to show cause why the Terminal and the East Side Lines should not be punished for contempt of the injunctive orders and decree of the District Court (Tr. 149) which were entered on the mandates of this Court. (Tr. 119, 120, 121, 122, 123; 224 U. S. 383; 236 U. S. 194.)

In the District Court the Government did not participate in the proceeding for contempt and took no action with respect thereto. Likewise, in answer to a communication dated November 18, 1920 (Tr. 490), the Interstate Commerce Commission, under date of November 26, 1920, writing by Chairman E. E. Clark, declined to take action with respect to "questions of tariff construction and application which under ordinary circumstances we would feel obliged to raise in connection with the attempt made by the M., K. & T., the Frisco, the Missouri Pacific, and the Rock Island to conform their participation in tariffs to what they believe to be the decree of the court, but inasmuch as this matter is before the court * * * we shall, for the present at least, withhold challenge to your tariffs." (Tr. 492.) On July 24, 1915, the Commission, through its secretary, also advised the traffic manager of the Terminal Association, "Responsibility for strict conformance with the decree of the court rests upon your company, and it must determine for itself what action may or may not be taken under such decree." (Tr. 338.)

The decree of the District Court appealed from adjudges the Terminal and the East Side Lines continuously in contempt of the court by violating the

Terminal Railroad Association, 224 U. S. 383. Paragraph 1 of that decree, with the italicized lines added as a result of the mandate in *United States* v. *Terminal Railroad Association*, 236 U. S. 194, is as follows (Tr. 123):

> 1. The Terminal Railroad Association of St. Louis is an unlawful combination contrary to the Antitrust Act of July 2, 1890 (26 Stat. 209), when it and the various bridge and terminal companies composing it are operated as railroad transportation companies. The combination may, however, exist and continue as a lawful unification of terminal facilities upon abandoning all operating methods and charges as and for railroad transportation and confining itself to the transaction of a terminal business such as supplying and operating facilities for the interchange of traffic between railroads and to assist in the collecting and distributing of traffic for the carrier companies, switching, storing, and the like, and modifying its contracts as herein specified. An election having been made to continue the combination for terminal purposes the defendants are therefore perpetually enjoined from in anywise managing or conducting the said Terminal Railroad Association or any of its constituent companies and from operating any of the properties belonging to it or its constituents otherwise than as terminal facilities for the railroad companies using the same, and from making charges otherwise than for and according to the nature of the services so lawfully authorized to be rendered. *Pro-*

vided, however, that the right of said Terminal Railroad Association as an accessory to its strictly terminal business to carry on transportation as to business exclusively originating on its lines, exclusively moving thereon, and exclusively intended for delivery on the same is hereby recognized, and nothing in this decree shall be construed to deny such right.

The remaining pertinent paragraphs dated January 29, 1914, and filed March 2, 1914 (Tr. 119), are as follows (Tr. 122):

3. Hereafter traffic destined to St. Louis, Missouri, or to points west of the Mississippi River and to be transported through the St. Louis gateway or traffic from St. Louis, Missouri, destined to points east of said river, shall not be billed to East St. Louis, Illinois, or other junction points or termini of the railroads of any of the said railroad companies east of the river and then rebilled to destination, but for all such traffic each railroad company shall issue through bills of lading unless otherwise directed by the person controlling the same. The defendants are perpetually enjoined from violating the above provisions.

4. The defendants are perpetually enjoined from making any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called one hundred mile area that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area.

5. The provisions of this decree shall extend to and embrace all railroad companies now or hereafter admitted to joint ownership or use of the facilities of the Terminal Railroad Association and to its facilities present and future acquired.

6. Nothing in this decree shall be taken to affect in anywise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Railroad Association or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such commission.

The single question is whether the Terminal and the East Side Lines are violating the decree of the District Court. The middle of the case may quickly be reached by a reference to undisputed facts found in the opinions of the learned Circuit Judges sitting in the District Court.

Circuit Judges Sanborn, Carland, and Stone sat at the first hearing (Tr. 494). Judge Carland wrote the opinion. After reviewing the procedure and overruling motion to dismiss, he stated the basis of the controversy to be "that if the Terminal is allowed, in violation of the decree, to operate as a railroad transportation company and not as a terminal, it will be possible for it, by reason of what are called the east-side lines of railroad, * * * to compel the west-side lines, * * * to pay the transfer charges of the Terminal both ways across the Mississippi River, amounting in the case of one of the petitioners

to five hundred thousand dollars per annum." (Tr. 496.)

After observing that the Terminal, prior to the institution of the original suit and prior to the decree, was operated as an independent carrier between the East Side and West Side lines was settled by the decree, that the Terminal has been so operated at all times since was either admitted or shown by the evidence; and that, acting as a railroad company, and not as a terminal company, was the only ground on which the Terminal was declared an unlawful combination, Judge Carland said (Tr. 497):

> The evidence and admissions of counsel show that the Terminal, in addition to doing a terminal business proper, and in addition to transporting as an accessory to their strictly terminal business traffic exclusively originating, moving, and having its destination upon the lines of the same, has at all times continued as before the entering of the final decree, and still continues to engage in the general railroad transportation business as an intermediate common carrier, as an initial common carrier, and as a delivering common carrier, and has made no changes whatever in its previous custom in that respect; that said Terminal is now, and ever since the entering of said final decree has been, engaged in the transportation, as a railroad common carrier and as a railroad transportation company, of every class of traffic, whether east or west bound, and whether coming to them from points beyond their terminals and delivered to

them by proprietary as well as by other railway companies, as well as all classes of traffic having origin in East St. Louis and whether upon its terminals or upon the terminals and rails of the same, of the proprietary and other railroad companies when destined to St. Louis, Missouri, or points beyond St. Louis, as well as traffic of every character originating in St. Louis, Missouri, and whether upon its own terminals or the terminals and rails of the proprietary companies or some other railway company in St. Louis, Missouri, for shipment to East St. Louis, as well as all such traffic destined to points beyond East St. Louis; that the Terminal continues to interpose itself as a transportation company between the railroads whose own rails terminate on opposite sides of the Mississippi River and between the city itself and the roads terminating on the east side of the river; that the Terminal is not acting in good faith as the impartial agent of the various proprietary lines; that the tracks, bridges, and other terminal facilities of the Terminal have not at any time been, and are not now being, used by the proprietary companies other than the petitioners, as extensions of their railroads; that the Terminal has not abandoned all or any operating methods and charges as and for railroad transportation, and has not at any time, and is not now, confining itself to the transportation of terminal business, such as supplying and operating facilities for the interchange of traffic between railroads and assisting in the collection and distribution

of traffic for the carrier companies, switching, storing, and the like; that the Terminal is now, and it has been at all times in the past, a party to innumerable tariffs, through concurrence therein and the filing of division sheets, whereby it participates as a common carrier and as a general railroad transportation company in the rates on all business so received and handled; that the east-side lines, having control of the Terminal, compel the west-side lines to pay the Terminal its transfer charges for supplying and operating facilities for the interchange of both through eastbound and through westbound freight traffic between the east-side lines and the west-side lines.

Accordingly, as a conclusion of law from the facts which were found the court held that the Terminal had acted in the premises in violation of the order and decree of the court; it was further ordered that the decree should be made more specific by (Tr. 498)—

1. Requiring the east-side lines to pay the reasonable transfer charges of the Terminal on westbound through freight to the rails of the west side lines;

2. Requiring the Terminal to cease and desist from issuing bills of lading or receipts taking the place of bills of lading, or issuing passes usable by passengers riding on through tickets from points on its lines to distant points beyond its lines;

3. Requiring the Terminal to cease and desist from becoming a party to tariffs through concurrences therein and the filing of division sheets;

4. These things to be done within sixty days from the date of the order;

5. Upon proof of noncompliance with the order, the appointment of a receiver and dissolution of the Terminal to be considered.

The three Circuit Judges stood unanimous except on the third requirement as to which Judge Sanborn alone dissented.

Subsequently, and before further action, Judge Carland died. The case was then called for further hearing before Circuit Judges Sanborn, Stone, and Lewis (Tr. 501). On resubmission Circuit Judge Lewis announced that on the previous hearing it was the unanimous conclusion of the three judges then sitting that respondents should be held as in civil contempt; that there was but a single difference between those judges in that Judges Carland and Stone had concurred and Judge Sanborn had dissented on the terms of the sixth paragraph of the decree. Circuit Judge Lewis then concurred in the previous limited dissent of Judge Sanborn. Judge Stone then recorded his dissent from the conclusions reached by the concurrence of Judges Sanborn and Lewis on paragraph 6. In a very carefully prepared opinion expounding the decree Circuit Judge Stone said (Tr. 508):

> Every reference in the decree and opinions to the methods, past and future, of operation (with the exception of the "arbitrary") were intended to effectuate and secure this definitely stated limitation in the character of future

operation. The terminal was declared to be unlawful if operated as a transportation line and to be lawful if operated purely and solely as terminal property. In the decree itself is the definition intended by the court of terminal operation. That definition is amplified in the opinions. The decree definition is "such as supplying and operating facilities for the interchange of traffic between railroads and to assist in the collecting and distributing of traffic for the carrier companies, switching, storing, and the like." This definition relates not merely, nor in fact at all, to the physical acts of terminal service, since those must necessarily remain the same as before but it referred to methods of charging, billing, and the like. This is proven by the requirements that it should abandon "all operating methods and charges as and for railroad transportation;" that the defendants were enjoined "from in anywise managing or conducting * * * and from operating any of the properties belonging to it or its constituents otherwise than as terminal facilities for the companies using the same, and from making charges otherwise than for and according to the nature of the services so lawfully authorized to be rendered;" that rebilling at East St. Louis was enjoined; and that through billing was required. The intent, purpose, and effect of the decree was to permit the combination to continue solely as the terminals of the carriers desiring to use the same. The decree covered all manner of operation, business, or charges which were different in a terminal property of a carrier

and in the outside of terminal haul or transportation business of the carrier. Those differences exist, practically speaking, in participations in and division of charges and tariffs of the regular using carrier and in issuance, as a separate carrier, of bills of lading and billing of freight passing off or coming onto its tracks.

It is true that the Interstate Commerce Acts give the Commission jurisdiction over terminal as well as regular transportation in respect to charges and methods of billing, but the Antitrust Act is fully applicable to railroads. The courts have jurisdiction, under the Antitrust Act, to declare that a combination of carriers, as to certain facilities, can not continue if they employ in connection therewith the methods of billing and manner of charging used by them in ordinary transportation. The Commission has nothing to do with that and certainly can not nullify such action of the court. The court decrees that this shall be a purely terminal association in all respects, including tariffs, charges, and methods of billing. The jurisdiction of the Commission attaches to determining the methods and charges within the scope or limits herein defined by the Supreme Court. That was the entire scope of the provision, in the decree, concerning the Commission. If the Association, any of its constituents, or any of the carriers using its facilities step outside the limits of the decree, the sanction by the Commission of the forbidden acts affords no shield or excuse to enforcement of the decree.

> The decree and the opinions are positive upon another point. That is, that the terminal shall be the agent of each of the using roads, impartially as to service and charges.

The four Circuit Judges stood united, therefore, on the whole of the decree appealed from, except that they stood equally divided on the following paragraph (Tr. 511):

> (*d*) In that the said Terminal Railroad Association has been issuing bills of lading or receipts taking the place of bills of lading usable for the transportation of through freight from points on its lines to distant points beyond its lines, and has been issuing passes usable by passengers riding on passes or tickets from points on its lines to distant points beyond its lines.

Here are four Circuit Judges of wide experience who concurred after two hearings that the Terminal and the East Side Lines stand in contempt of their decrees entered on the mandates of this court. The Terminal and the East Side Lines are fortunate that the Judges did not order complete dissolution of their relations which they were using not only to flout the Sherman Act but also judicial power to control them.

Opposing counsel would seem to contend that paragraph 6 of the decree authorized them to bring about a situation more destructive and disastrous to the public interest and the terminal situation in St. Louis than ever existed prior to the filing of the original bill and the announcement of the opinions

> it into execution, according to the mandate. That court can not vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.

That the Transportation Act has not repealed the Sherman Act as applicable to combinations of railroad companies is obvious from the late case of *United States* v. *Southern Pacific Co.*, 259 U. S. 214, which was argued and decided May, 1922, more than two years after the Transportation Act was passed. It does not appear from the opinion of Mr. Justice Day that any of the distinguished counsel in that case ever suggested that the Transportation Act had repealed or in any manner superseded the Sherman Act.

True paragraph (8) of Section 407 which amends the first paragraph of Section 5 of the Interstate Commerce Act provides (Ch. 91, 41 Stat. 482):

> The carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such order shall be, and they are hereby, relieved from the operation of the "anti-trust laws," * * * and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required *by any order made under and pursuant to the foregoing provisions of this section.*

It is not claimed that any order has been made by the Commission or applied for under Section 407. It will be time enough to consider such a question if, as, and when it arises. See *Control of Big Four by New York Central*, 72 I. C. C. 96, 98; *Control of Central Pacific by Southern Pacific*, 76 I. C. C. 508; *Control of Lake Erie & Western by Nickel Plate*, 72 I. C. C. 459.

If the Terminal and the East Side Lines prevail in their contention that the Transportation Act has "abated this whole litigation"; in other words, if in five appeals covering a period of 20 years the court, counsel, and litigants have all simply spent their time in beating the air, then the case so comes to an end. On the other hand, if the whole litigation has not abated, but the 20 years of effort have simply been made fruitless by the continued contempt of the Terminal and the East Side Lines, there then arises the question whether the Terminal Association should not be dissolved *in toto* in pursuance of the opinions of this Court and the decrees entered on its mandates, reference to which appears in the opinion of Judge Carland. (*Ante*, 12.)

On motion of the Government or on its own motion this Court has the power to direct that the Terminal Association shall be dissolved. In *Continental Insurance Company* v. *United States*, 259 U. S. 156, 166, Mr. Chief Justice Taft, speaking for the Court, said:

> We delegated to the District Court the duty of formulating a decree in compliance

with the principles announced in our judgment of reversal, and that gives us plenary power where the compliance has been attempted and the decree in any proper way is brought to our attention to see that it follows our opinion.

III.

CONCLUSION.

The "litigious tree which was planted a generation ago and has since borne an abundant harvest of distraction and confusion" should not only be cut down but its roots should be destroyed. Only dissolution of the Terminal will accomplish that result. The affirmance of the decree will require that the Terminal and the East Side Lines shall pay to the West Side Lines the losses which the latter have sustained by reason of the contempt. If the decree of the District Court is inadequate to control the Terminal and the East Side Lines, then a complete dissolution decree should be entered.

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